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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 247

EDWARD T. BLAIR,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR PETITIONER.

This reply brief is submitted because of the fact that the Government in its brief has argued for the first time in this litigation the contention of *res judicata.* Hence, that contention was not anticipated in our brief in chief and must be dealt with here.

RES JUDICATA.

(A) The contention of *res judicata* is not properly before the court.

The record will show that the contention was never at any time raised before the Board of Tax Appeals. The two consolidated proceedings were respectively filed before the Board of Tax Appeals in 1929 (R. 1) and April 2, 1932. (R. 12.) Answers were duly filed in each case, of course making no mention of *res judicata,* as the decision of

the Circuit Court of Appeals in the case for the prior year 1923 was rendered June 23, 1932 (60 Fed. (2nd) 340.) But the hearing was had more than a year later, September 5, 1933. (R. 28.)

While rule 14 of the Board requires the answer of the Commissioner to "fully and completely advise the petitioner and the Board of the nature of the defense" and to state "any facts upon which the Commissioner relies for defense," rule 17 provides for amendments at any time before conclusion of the hearing and to conform to the proof. And long prior to these dates, in March 1929 the Board itself held in *Reserve National Gas Company* v. *Commissioner,* 15 B. T. A. 951, that where a former decision of the Board is neither pleaded nor introduced in evidence and where it is asserted for the first time in a brief filed by counsel that the decision of such question is *res judicata,* the question can not be considered.

Yet the Commissioner made no amendment to his answer, did not introduce in evidence any prior judgment and made no contention whatsoever before the Board of Tax Appeals that the judgment of the Circuit Court of Appeals, or the subsequent order of the Board of Tax Appeals entered thereon, was determinative of the case before it.

Thus the record when measured by the decisions of this court recently made shows such waiver of the point as precluded it from being urged in the Circuit Court of Appeals.

In *Helvering* v. *Salvage,* 297 U. S. 106, 109, this court, with reference to a claim of estoppel against the taxpayer because of his action as to prior tax years, held that that defense had not been made before the Board of Tax Appeals and therefore could not be raised in the Circuit Court of Appeals, citing the prior case of *General Utilities and Operating Company* v. *Helvering,* 296 U. S. 200, wherein it is held that the Circuit Court of Appeals

should have overruled a certain contention made by the Commissioner, as it "was not presented to or ruled upon by the Board." (P. 206.) *Res judicata* in the sense used in the case at bar is, of course, but an estoppel by judgment and the same rule must apply.

Moreover the decree of the Superior Court of Cook County was introduced in evidence by stipulation (R. 32, P. 21, 22) subject to the Commissioner's objections as to materiality. But no objection was ever made. And obviously if the prior decision of the Circuit Court of Appeals were *res judicata,* the Superior Court decree would be inadmissible. And the failure to object was another indication of waiver of the point.

It is true that the petition for appeal from the Board of Tax Appeals to the Circuit Court of Appeals (R. 102) assigns as error that "the Board erred in not holding that the question as to whether a spendthrift trust was created was *res judicata.*" But even if that assignment were permissible in view of the fact that the question was not raised before the Board and therefore the Board could not have erred in that connection, the Government subsequently failed to argue the point in the Circuit Court of Appeals, or even present it in such a way as to call it to the court's attention. The opinion of the Circuit Court by its silence demonstrates that conclusion.

In this, counsel for the respondent, in their brief recently filed (P. 12), differ with us when they say, "The *res judicata* issue was argued in the court below, but was not ruled upon by that court." But reference to the brief of the Government filed in the Circuit Court of Appeals and certified to this court in connection with this particular point will show that there was no such argument made. A close reading of the brief fails to show in any part of it even a single use of the words "*res judicata*" or "estoppel by judgment,"

and nowhere is there an authority cited upon the proposition. In that brief the following appears:

> In "Questions Presented" (P. 2), no reference to *res judicata* directly or indirectly is made.
>
> Reference in the statement is made to the prior decision as a fact but in the "Specification of Errors to be Urged" (P. 8) no reference is made to *res judicata.* One of the specifications is that the Board erred "in not holding that the Board was bound by the decision of this court on prior appeal." (P. 9)
>
> In the "Summary of Argument" the following reference is made. "Upon a prior appeal relating to an earlier year this court held that the taxpayer was beneficiary of a spendthrift trust, without power to make assignments. That decision correctly states the Illinois law applicable to the situation and the Board of Tax Appeals erred in refusing to be guided thereby and in following the erroneous decision of the Appellate Court to the contrary. That decision is inconsistent with the decisions of the Illinois Supreme Court, and consequently is not binding on this court, particularly as the Government was not a party to the suit in the State Court."
>
> Nowhere in the brief is the point separately and specifically asserted that there was a *res judicata.*
>
> There are only two points urged in the brief: I, that "The taxpayer assigned future income and not property productive of income" (P. 10), and II, that "The trust * * * is a spendthrift trust and the taxpayer had no right to alienate his interest thereunder." (P. 19.)
>
> In discussing neither of these points did the Government refer directly or indirectly to *res judicata,* or cite any authority whatsoever to support any such contention.
>
> And with reference to the second point referred to, the Government concluded: "It is our view that the Board below erred in following the erroneous decision of the Appellate Court and also erred in not accepting as authority the ruling of this court. *Commissioner* v. *Blair, Supra,* 60 Fed. (2d) 340." We respectfully submit that the most that can be said for this language is that it raises the contention that the original decision of the Circuit Court of Appeals is an authority, just as is contended in the present brief of the Government at

page 26 where they speak of that decision "as a square authority to that effect" (the spendthrift trust contention). (P. 21.)

The issue not having been argued before the court below, was waived and is not open for review at this time. See *United States* v. *Mitchell,* 271 U. S. 9, 14; *Webster* v. *Fall,* 266 U. S. 507, 511; 3 American Juris Prudence, P. 334, Par. 774; P. 335, Par. 775, 776; *Southeastern Express* v. *Robertson,* 264 U. S. 541, 542; *Donnelly* v. *United States,* 276 U. S. 505, 511.

(B) But we stand not only on the proposition that *res judicata* was not raised in the court below and in the Board of Tax Appeals, but also on the proposition that the doctrine itself does not apply in this case.

The Tait case (*Tait* v. *Western Maryland,* 289 U. S. 620) cited by the Government to support its proposition at once states the rule and the limitation which takes this case outside of the doctrine. In that case, as in the case at bar, the contention was with reference to the effect of a judgment as to a prior tax year upon a subsequent tax year before the court, and this court said (P. 623):

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. *In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action.*" (Emphasis ours.)

But it was undisputable in that regard that the facts in the prior case were the same as those in the subsequent case and were so found by the District Court (P. 622) as well as by the Circuit Court of Appeals—this court saying (P. 626):

> "But the Circuit Court of Appeals has found that all of the facts stipulated in the present cause were before it in the former one and we accept the finding."

In view of that situation this court found the doctrine of *res judicata* to apply and control the case before it.

The case of *Boal* v. *Metropolitan Museum of Art,* 19 Fed. (2d) 454 (Second Circuit) presents a situation similar to our own. In that case it appears that the will of Davis, a resident of Rhode Island, was being construed. It was contended that two clauses of the will were void. Prior decisions in connection with other phases of this estate had been handed down by this same Circuit Court of Appeals and by the First Circuit. Then in another case, connected with the construction of the will, the courts of the State of Rhode Island with the necessary parties before it held that the clauses in question were valid. This decision was pleaded in the Federal Court. The Circuit Court of Appeals holds that in the later case before it the situation was different from what it was in the first place, and that therefore the State Court decision and not its own prior decision should control. In this connection the court says (P. 459):

> "Because of the probate of the trust deed, and what has been said by the highest court of the state as the validity of its clauses, the case is different than it was when here before (298 F. 894), and also from the case presented before the First circuit in 275 F. 513. We are not now at liberty to hold that the trust deed was invalid as a testamentary disposition. It is much like a situation where a new will has been found and admitted to probate."

Certiorari denied 275 U. S. 565.

The same result was reached in the case of *Messenger* v. *Anderson,* 225 U. S. 436, where there was first a judgment of the Federal Court construing a will and then a judgment of the State Court construing the will contrariwise and this court followed the State judgment.

But in the case at bar the decision here on appeal was not upon the same facts which were before the Circuit Court

of Appeals in the prior decision. In this case there is a new and all important fact that was not before the Circuit Court of Appeals in the prior case.

In the prior case one of the issues was whether or not the trust was a spendthrift trust under which the beneficiary could not make an assignment. To determine that issue the facts before the court were two: First, the trust instrument itself, and second, the law of Illinois controlling that trust.

But at that time the law of Illinois had not been determined—there had been neither a decision of any court of competent jurisdiction with reference to the rights of the parties under the particular trust, nor was there an authoritative decision of the highest court of the state flatly deciding the point.

Therefore, the Circuit Court of Appeals was required to interpret the law of Illinois from the related decisions of the Supreme Court. And it did so, and held that that law was such as to make the trust a spendthrift trust.

But in the instant case, the same situation did not exist. There was before the Board of Tax Appeals and before the Circuit Court of Appeals the law of the case with reference to the property rights of the parties in the trust—that is, the decree of the Superior Court of Cook County, not merely the decision of the Appellate Court of Illinois, but the decree of the Superior Court of Cook County, Illinois, in a case where the court had jurisdiction over the parties and the subject matter, adjudicated just what the rights of the beneficiary and assignees were in that property.

That is the new and different fact which is in this case and which was not in the prior case, and which takes this case outside the doctrine of *res judicata*.

And the Board of Tax Appeals so held when it said with

reference to the prior decision of the Circuit Court of Appeals (R. 94):

> "that the situation is different here, there having been a subsequent decision of the Appellate Court of Illinois construing the subject matter involved."

Another view of the situation is that the decision of the Circuit Court of Appeals with reference to the trust could only be tentative and collateral so far as the property rights of the parties were concerned. It had no jurisdiction or authority to decide those property rights. And the decision, therefore, was purely for the purpose of that case. But when the judgment of the Superior Court of Cook County having real jurisdiction over the parties and the subject matter determined those property rights, the tentative judgment of the Circuit Court of Appeals, so far as subsequent litigation is concerned, had and could have no effect.

And that must be the result of the development. For here we have two judgments. One by the State Court having jurisdiction over the matter deciding the property rights one way, and the other by the Circuit Court of Appeals having jurisdiction only incidentally deciding the question the other way. If the contention of the Government is to stand, then both judgments stand and the property rights and the income flowing from those rights would belong to one group of people, the assignees, while for the balance of his life Edward T. Blair would have to pay a tax upon what is not his. And this result obviously must be avoided as it would in itself present a very serious constitutional question of its validity. *Hoeper* v. *Tax Commissioner of Wisconsin,* 284 U. S. 206.

Then too, the property right having been determined to belong to the assignees, the income would be theirs and under the case of *Irwin* v. *Gavit,* 268 U. S. 161, referred to in our brief in chief, they would have to pay the tax on that

income,. even though Edward T. Blair under force of the prior judgment would have to pay it also—if the Government is right.

Furthermore, if both judgments are to be given effect we would have the anomaly of other beneficiaries of trusts such as this and who might have assigned their interest, paying no tax, while this particular beneficiary would pay for the balance of his life.

It is no answer to argue as the Government has argued on page 19 of its brief, that the Government was not made a party to such controversy in the state courts and not even notified. There is nothing new about this situation. The courts of the states and the federal courts every day in all parts of the country consider litigated questions involving property rights, the decisions of which collaterally affect to a large extent federal tax questions.

Consider the most frequently referred to example, that of a will creating a trust giving the entire income to one beneficiary, all of which would go into the high brackets of the income tax law. Litigation develops out of the contention that the will was void on the grounds of undue influence or lack of capacity, or on the ground that it violated the rule against perpetuities, or any one of a number of other reasons. The will is set aside and the property divided among any number of people in amounts so small that either no tax is paid, or a very small tax, with the result that the Government gets far less than on the other theory. But the Government could not possibly interfere and ask that the will be sustained on the ground that that would give it a larger tax or complain of the judgment for the same reason.

Or consider a dispute between a very wealthy man usually paying income taxes in the high brackets, and a man of very modest means over the ownership of shares of stock.

The Government could not possibly be a party to the litigation and yet the outcome would directly affect the income tax that is paid on that item.

One of the best examples of the situation is found in the two cases decided by this court—the case of *Lucas* v. *Earl,* 281 U. S. 111, where an assignment by a husband to his wife of income from his law practice, was held ineffective as far as this question is concerned, and the case of *Poe* v. *Seaborn,* 282 U. S. 101 where the community property law of Wisconsin was held to accomplish the purpose in an exactly similar situation. That law was passed by the Legislature of Wisconsin without any consultation with the Government or its tax authorities, and yet it had a direct bearing on the question of taxes.

In short, the decree of the Superior Court of Cook County, Illinois, being a decree affecting property rights is good as against all parties claiming any interest not only the parties to the litigation, but all having any interest whatsoever in it. That *decree* determines the property rights of the parties and for the reasons and cases cited in our brief in chief is the law of this case.

We respectfully submit that in the light of the decisions referred to the doctrine of *res judicata* or estoppel by judgment does not apply in this case so as to make the decision of the Circuit Court of Appeals in 60 Fed. (2nd) 340 with reference to the prior tax year a binding judgment in this case with reference to the subsequent tax years.

II.

(A) At this point, the solicitors for the respondent discuss the assertion that under the Illinois law the trust is a spendthrift trust.

It is first asserted that "the judgment of the Illinois Court holding that the trust is not a spendthrift trust is not controlling in this proceeding." (See P. 13.)

Here as well as in the statement of fact, counsel for the Government prefer to regard the judgment of the *Appellate Court* of Illinois as the one being relied on as controlling. That is not our contention. Our contention is that the *law* of this case is the decree of the Superior Court of Cook County (R. 76 to 79) entered subsequent to and in accordance with the order of the Appellate Court of Cook County (R. 75) reversing the prior decree and remanding the cause with directions to enter a decree consistent with the views expressed in the opinion of the Appellate Court. (R. 74, 75.) It is that decree so entered holding the assignments valid that we contend is controlling of the property rights in this case.

To support the opposite contention the Government cites a number of cases which we respectfully submit are not applicable to the facts here. In all of such cases the inquiry was as to how far the Federal Courts were bound by *general decisions* of the state court in determining what the law of that state was. They do not involve the question of how far the Federal Courts are bound by a decree or judgment of a state court determining property rights with relation to the very subject matter before the Federal Courts.

One of the cases particularly relied on by the Government is *Barber* v. *Pittsburgh etc. Railway,* 166 U. S. 83.

That was an action of ejectment originating in the Federal Court. The rights of the parties depended upon what estate Amanda Stephens took under the will of James S. Stevenson in the property involved. Prior to the case in question another ejectment suit had been brought in the State Courts of Pennsylvania and had been finally determined in the Supreme Court of that state. In the Federal case one of the questions that finally came before this court was whether or not that decision of the Supreme Court of Pennsylvania was conclusive upon the Federal Courts. After stating the case, this court says (P. 99):

> "The decision of the Supreme Court of Pennsylvania, in the former action of ejectment, *is certainly not conclusive as an adjudication of the rights of the parties,* inasmuch as a single verdict and judgment in ejectment, not being conclusive under the laws and in the courts of the State, is not conclusive in the courts of the United States, and is no bar to a second action of ejectment." (Italics ours.)

So at the very outset it appears that the decision of the State Court was in itself not determinative of the property rights of the parties even in Pennsylvania. This court goes on to say (P. 99):

> "When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a state, that construction is to be followed by the courts of the United States in determining the title to land within the State, whether between the same or between other parties."

And again on page 100:

> "But a single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State, in a case in a court of the United States, involving the construction of the same or like words, between other parties, or even between the same parties or their privies, *unless presented under such circumstances as to be an adjudication of their rights.*" (Italics ours.)

We desire to call particular attention to this court's language "unless presented under such circumstances as to be an adjudication of their rights." For here there is no question but that with reference to the parties—the beneficiary and the assignees and trustees—having interests in the trust property, the decree of the Superior Court of Cook County, Illinois, was "an adjudication of their rights." So, far from supporting the Government's position, we submit that under the rule of this very case the decree of the Superior Court is controlling in the case at bar on this issue.

So, too, the next case cited, *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, does not involve this question at all. For in that case it appears that the prior judgment of the State Court was not with reference to the particular contract involved in the Federal Court case, or the rights of any of the parties who were before the Federal Court. The prior State Court judgment was merely with reference to an identical contract between other parties, so that it did not settle any property rights of the parties or in the matter involved in the Federal Court.

The case of *Lane* v. *Vick*, 3 How. 464, is another one relied on by the Government in this connection, but in that case also the same situation appeared. This court in its analysis of that case in the case of *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349 (P. 362), points out that the construction of the will in question by the prior State Court decree was merely incidental and was not binding on any one claiming under the will.

The same is true with reference to the case of *B. & W. Taxi Company* v. *B. & Y. Taxi Company*, 276 U. S. 518, where this court reviewed all the decisions on the question. But there also the case did not involve the question here presented, as the prior decisions of the State Courts

merely held that contracts similar to the contract before this court were invalid, whereas the decisions of this court construing the common law with reference to such contracts were held valid; hence, it is clear that in that case the property rights of the parties before this court had not been adjudicated by any State Court, judgment or decree.

None of these cases gainsay to any extent the proposition laid down in the case we cited in our brief in chief, but did not quote from *Uterhart* v. *United States,* 240 U. S. 598. That case involved a question of succession taxes under a Federal statute and the question as to the amount of the tax depended for its solution upon the character of the estate taken by the taxpayer under the will of the decedent. There had been a decree entered in the New York court where the decedent had lived and the will had been probated, and this court held that the Federal Courts in determining the question before it were bound by that decree. In so holding this court stated (P. 603):

> "It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (*Knowlton* v. *Moore,* 178 U. S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."

This case was followed in *Sutherland* v. *Selling,* 16 Fed. (2d) 865, wherein it was held that the State Court had full and complete jurisdiction over the subject matter of the construction of the will,

> "Thus vested with jurisdiction the highest court of the State had construed the will and the laws of the State, and that construction is binding on a Federal Court sitting in the same State regardless of any question of parties or *res adjudicata.*" (P. 868.)

Also in the case of *Boal* v. *Metropolitan Museum of Art,* 19 Fed. (2d) 454, above cited, the court refers to the Uterhert case, as well as to the Kuhn and Burgess cases above referred to, and relied on by counsel for the Government and says in that connection (P. 459):

> "The rule referred to by the appellees in *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 30 S. Ct. 140, 54 L. Ed. 228, and *Burgess* v. *Seligman,* 107 U. S. 20, 2 S. Ct. 10, 27 L. Ed. 359, is not applicable here, because the situation is now entirely different than that which existed at the time the federal courts first took jurisdiction, independently of the state courts. Now the principles announced in *Uterhart* v. *United States,* 240 U. S. 598, 603 * * * are applicable: * * *"

Certiorari denied 275 U. S. 565.

Hidden v. *Durey,* 34 Fed. (2d) 174, was a state tax case in which the Federal District Court of New York held that the Collector of Internal Revenue, as well as the Federal Court, was bound by the decisions "of the appropriate State Courts upon the probate of wills and their construction." (P. 178.)

In *Smith* v. *Collector of Internal Revenue,* 78 Fed. (2d) 897, which was also a tax case, it appears that a resident of Rhode Island died leaving a will which was contested. But under the law of that State the proponents and contestants of the will agreed to a compromise whereby new provisions were in effect written in the will. The question was whether the tax should be computed with reference to the will as originally drawn, or as the will was compromised and approved by the State of Rhode Island Court, and the Circuit Court of Appeals of the First Circuit, following the Uterhart case states that the Federal Courts were bound by the decree of the State Court.

Counsel for the Government seek to distinguish the case of *Freuler* v. *Helvering,* 291 U. S. 35, on the ground that the section of the Revenue Act involved provided that the

income of a trust should be taxable to the beneficiary as pursuant to the instrument or order governing the distribution, but the decision would be the same without that phraseology for the reason given by the court. (P. 45.) The decision of the California Court

> "until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them."

So in this case the rights of the beneficiaries and those interested in the trust property have been adjudicated and the decision is binding unless reversed. The Illinois Supreme Court has also held that a decree of *nisi prius* court with reference to the property rights of the parties in a trust is binding until set aside. *Chapman* v. *The Northern Trust Company,* 296 Ill. 353. See also *Town of Kaneville* v. *Meredith,* 361 Ill. 556.

With reference to the Superior Court decree, it is contended incidentally (P. 19, Government's brief) that there was no dispute between the parties. But the bill filed in the State Court demonstrates that the entire matter, including all of the decisions relied on by the Government, were referred to the Illinois Court; and the Board of Tax Appeals found as a fact that such was done (R. 87), that the two conflicting decisions were presented to the Appellate Court (R. 89) and that "there was no showing * * * that the proceedings in the State Court were collusive or that the decree or decision of the State Courts were entered by counsel." (P. 94.)

We submit that the decree of the Superior Court of Cook County is controlling in this case on the issue of the assignability of the beneficiary's interest and the validity of the assignments.

(B) The brief of counsel for the Government next takes up assertion that the trust in question was a spendthrift trust.

We submit that for the reasons already given that question has been disposed of by the Superior Court of Cook County in its decree.

We submit, moreover, that the decision of the Illinois Courts on this question of Illinois law was right. For there being no decision of the Supreme Court on all fours with the case being considered, the question had to be answered from an analysis of the related decisions of that court. Just as an analysis was made by the Appellate Court in this case 274 Ill. App. 23 (R. 67), when it determined that the distinction between restraints on voluntary alienation and restraints involuntary alienation, already recognized specifically by other Courts (*Ames* v. *Clarke,* 106 Mass. 573; *Boston Safety Deposit & Trust Co.* v. *Luke,* 220 Mass. 484) was also the law of Illinois. Just such an analysis was also made by an Illinois textwriter, A. M. Kales, of whom the Circuit Court of Appeals, while refusing to follow his conclusion, nevertheless said, 60 Fed. (2d) 340:

> "Indeed, Mr. Kales, a former member of the Illinois Bar, in his most excellent work on 'Estates, Future Interests, and Illegal Conditions and Restrains in Illinois,' c. 27, T. 6, is not in accord with the reasoning or the results of the Illinois cases on this subject, and he offers some very pertinent and constructive criticism."

A further analysis of these cases we submit is inappropriate in view of the decree of the Superior Court of Cook County.

III.

Under this heading counsel for the Government discuss the proposition of "the transactions were assignments of future income and not of a present interest." Counsel then gathered together most of the cases on the question and classified them with reference to factual situations. They then say at page 34, "In all these cases the courts have applied, but not always consistently, the general rule that income from personal service is taxable to the one who earns it; that income from property is taxable to the owner or to the one retaining control of the property producing the income, *and that any anticipatory arrangement designed in such case to divert income to another is in effect to divert the tax.*" (Italics ours.) This statement, we submit, is confused. It is true that income from personal service is taxable to the one who earns it, as held in the cases of *Lucas* v. *Earl*, 281 U. S. 111, *Burnet* v. *Leininger*, 285 U. S. 136, and that with reference to such income any anticipatory arrangement of assignment does not relieve the assignor of the burden of paying the taxes. But it is not true that it has been held with reference to income from property, that any anticipatory arrangement of assignment of that income does not carry with it the burden of paying the tax.

The case of *Burnet* v. *Leininger*, 285 U. S. 136, clearly falls within the first classification, as it involved personal earnings. And moreover, there was also involved a question of partnership as pointed out in our brief and as in the Lucas case. The statement in counsel's brief that the assignment in this case, as in the Leininger cases (see page 39 of the Government's brief) was "bottomed" on the fact that the income was to be petitioner's property is not correct. The income was not the petitioners and on the con-

trary the assignment was "bottomed" on the equitable life interest in the trust estate which was an assignable interest. In the Earl and Lucas cases there was no equitable interest in any property producing the income.

Respectfully submitted,

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